

The Complainant seeks an order requiring Respondent to remove the bicycle rack and to restore the area of the common element where the bicycle rack is located to its original condition.

The Respondent, through its attorneys, Steven A. Silverman and Thomas C. Schild, asserts that: the Commission has no jurisdiction over this matter; even assuming that it does, the Board of Directors retains exclusive authority to implement its powers over the amenities, which are located in the common areas, and that the bicycle rack is no different from other amenities such as trees and parking spaces. Respondent also requests the recovery of attorney's fees if the Commission finds that the complaint was pursued in bad faith.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership for action pursuant to Section 10B-11(e). On April 7, 1993, the Commission voted to hold a public hearing, which commenced and concluded on July 26, 1993.

PRELIMINARY MATTER: MOTION TO DISMISS FOR LACK OF
(SUBJECT MATTER) JURISDICTION

As stated above, Respondent moved to dismiss the Complaint for lack of jurisdiction upon the ground that this is only a disagreement (and not a dispute as defined in Section 10B-8(3)), which involves the discretion of a governing body in taking or deciding not to take any legally authorized action, as provided in Section 10B-8(4).

Upon consideration of the oral arguments and the record on this question, the Commission orders that the Motion be and hereby is DENIED. It is the conclusion of the Commission that the dispute does involve the authority of a governing body under Section 11-108 of the Real Property Article, Maryland Annotated Code and under Article V Section 13 of the Bylaws of Whitehall Condominium, to alter or add to a common area or element and/or to spend association funds in doing so, as provided in Section 10B-8(3)(A) (iii) and (iv).

FINDINGS OF FACTS

Based on the testimony and evidence of record, the Commission makes the following findings of fact:

1. The Complainant resides at 4927 Battery Lane, Unit 102, Bethesda, Maryland 20814.
2. The unit of the Complainant is part of the Whitehall Condominium, which contains 13 townhouses and 288 highrise units.
3. The Complainant submitted a series of correspondence to representatives of the Respondent concerning the problems with installation of the bike rack at the side entrance to the West Building Garage. This correspondence is, respectively, dated July 27, 1991, July 31, 1991, August 9, 1991, September 16, 1991, and

May 6, 1992. In it the Complainant raises factual and legal issues concerning the legality of installation of the subject bicycle rack, the loss of market value to her unit, the loss of aesthetic value to her unit, the projected increase in insurance premiums to be paid by the Association related to it, the location of the bicycle rack in a grove of pine trees and bushes, the safety hazard to bicyclists and motorists who use the garage and the reliability and accuracy of the bicycle survey conducted by the Respondent. The memo dated September 16, 1991 from the Complainant to the Board requested removal and relocation of the bicycle rack.

4. According to the testimony of the President of the Association at the time the bicycle rack was relocated, the Respondent at no time gave a direct written or oral response to the Complainant, addressing the questions raised by the Complainant in her series of correspondence.

5. In late July, 1991, part of the bicycle rack was relocated from an area adjoining the North Building to the side entrance of the West Building Garage, which location is the subject of this Complaint and of the above-referenced correspondence from Complainant to Respondent.

6. The bicycle rack holds approximately fifteen bicycles.

7. The distance from the closest aspect of the unit of the Complainant to the bike rack is approximately sixty-five feet.

8. The relevant section of the Real Property Article of the Maryland Annotated Code provides as follows:

11-108 Use of Common Elements

(a) The common elements may be used only for the purposes for which they were intended and, except as provided in the declaration, the common elements shall be subject to mutual rights of support, access, use, and enjoyment by all unit owners. However, subject to the provisions of subsection (b), any portion of the common elements shall be used only by the unit owner of the unit to which their use is limited in the declaration or condominium plat.

9. A bicycle rack was located on the grounds of the Property on or about the time the Property was converted to a condominium in 1982.

10. The use and purpose of the entranceway to the West Building Garage is not altered or impaired from its original use by the installation of a bicycle rack adjacent to it.

11. Commission's Exhibit 1a is an accurate, complete copy of the Bylaws in effect at the time the bike rack was installed at the side entrance of the West Building Garage in late July, 1991. The relevant sections of the Bylaws appear in Article V and provide as follows:

Section 13. Restrictions on Use of Units. In order to provide for the congenial occupancy of the Property and for the protection of the values of the Units, the use of the Property shall be restricted to and shall be in accordance with the following provisions:

* * *

(c) No immoral, improper, offensive, or unlawful use shall be made of the Property or any part thereof, and all valid laws, zoning ordinances and regulations of all governmental agencies having jurisdiction thereof shall be observed. All laws, orders, rules, regulations, or requirements of any governmental agency having jurisdiction thereof, relating to any portion of the Property, shall be complied with, by and at the sole expense of the Unit owner or the Board of Directors, whichever shall have the obligation to maintain or repair such portion of the Property.

* * *

(n) No structure of a temporary character, trailer, tent, shack, barn or other outbuilding shall be maintained upon any common elements at any time. Outdoor clothes dryers or clotheslines shall not be maintained upon any common elements at any time....

(o) Nothing shall be stored or placed upon any balcony or patio or upon any other portion of the common elements of the Property, except with the consent of the Board of Directors.

Section 14. Additions, Alterations or Improvements by Board of Directors. ...Any additions, alterations or improvements costing Twenty-Five Thousand Dollars (\$25,000.00) or less may be made by the Board of Directors without approval of the Unit owners, and the cost thereof shall constitute a common expense....

12. The cost to cut and relocate the bike rack was less than \$25,000.

13. The bicycle rack has no awning and does not constitute a "structure", as contemplated in Article V, Section 13(n) of the Bylaws.

14. Although the sight of the bicycle weather covers is not attractive, the view of the bicycle rack from the Complainant's unit, as depicted in numerous exhibits from both parties, is substantially buffered by landscaping and is not offensive or improper.

15. The Respondent plans to install and maintain suitable landscaping on and about the bicycle rack to present a substantial sight barrier from the viewpoint of the unit of the Complainant and other viewpoints within the units.

16. The Respondent, not due to any inappropriate action by the Complainant, elected to retain counsel with respect to the captioned matter approximately ten months before the date of the hearing and prior to the date the Commission voted to take jurisdiction of the case.

CONCLUSIONS OF LAW

1. The location and appearance of the bicycle rack at the side entrance of the West Building Garage does not constitute an immoral, improper, offensive, or unlawful use of the Property, as such term is defined in the Declaration of the Condominium, which is part of Commission's Exhibit 3.

2. Article V, Section 13 of the Bylaws places a restriction upon the use of the units by the unit owners and does not restrict or prohibit the use by the Association of the common elements, as demonstrated by the following:

a) Sub-paragraph (c) is a requirement that the unit owner shall comply with applicable governmental rules, regulations or requirements relating to lawful and proper use of the unit and the Property.

b) Sub-paragraph (n) is a restriction upon the unit owner making unauthorized use of the common elements or limited common elements.

c) Sub-paragraph (o) is a specific restriction upon the unit owner using his/her balcony or patio as a storage area, except with the consent of the Board of Directors.

3. Section 11-108 of the Real Property Article protects the unit owner from material and significant changes in the use of the common elements by the Board of Directors or the Council of Unit Owners. Reflecting this limitation, the Bylaws of the Association grant the Board of Directors limited authority to make additions or alterations to the common elements (Article V, Section 14). The record indicates that a bicycle rack existed on the Property on or about the time it was established as a Condominium. Even assuming that the bicycle rack had not been present at the time the

Condominium was created, the relocation of part of a bicycle rack within the general common elements of a residential condominium does not constitute a material change or departure from the intended purpose of the common elements.

4. The Board had authority under the Bylaws, including Article V, Section 14 thereof, to relocate the bicycle rack as an alteration or improvement without the approval of the unit owners.

5. The Board of Directors and its Operations and Maintenance Committee acted within their purview under the business judgment rule in deciding to relocate the bicycle rack and in ratifying such decision. The Court of Special Appeals has stated that this rule requires only that persons in a fiduciary relationship to the unit owners act reasonably and in good faith in carrying out their duties. Courts are reluctant to second guess the actions of directors in carrying out their duties, unless there is the appearance of fraud, dishonesty or incompetence. See Black et ux v. Fox Hills North Community Association, Inc. 90 Md App 75, 599 And 1228 (1992).

6. The Commission concludes that the award of attorneys' fees to Respondent is not appropriate in this matter. There was no evidence entered into the record to the effect that the Complainant filed or maintained a frivolous dispute, or filed or maintained a dispute other than in good faith; unreasonably refused to accept mediation of a dispute or unreasonably withdrew from ongoing mediation; or substantially delayed or hindered the dispute resolution process without good cause. To the contrary, as noted in the Findings of Fact, the conduct of the Respondent in failing to respond to a persistent series of correspondence from the Complainant contributed to the decision by the Complainant to file the instant action and may have substantially delayed or hindered the informal and formal dispute resolution process without good cause. Given its course of conduct in failing to respond to Complainant's concerns, the Commission specifically criticizes the conduct by Respondent.

ORDER

In view of the foregoing and based on the evidence of record and the conclusions of law stated herein, the Commission hereby ORDERS that:

1. The request of the Complainant to remove the bicycle rack and restore the subject area to its original condition is hereby DENIED.

2. The Respondent shall be permitted to continue to maintain the bicycle rack adjoining the entrance of the West Building Garage, as shown on Complainant's Exhibits C-18 and C-21, and shall continue to maintain the existing extent of landscaping surrounding such bicycle rack.

3. In the spirit of efficiently resolving disputes between governing bodies and unit owners, the Association should exert diligent efforts to respond within a reasonable time to future correspondence by the Complainant, in which she states concerns about the subject bicycle rack.

4. The request of the Respondent that Complainant shall pay its attorney's fees is hereby DENIED.

The foregoing was concurred in by panel members Alper, Jacobsen, and Kerstetter.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the date of this Order, pursuant to Chapter 1100 of the Maryland Rules of Procedure.

Richard S. Alper

Richard S. Alper, Panel Chair
Commission on Common Ownership
Communities